Supreme Court, U.S.
FILED
NOV 8 1994
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No. 93-1935

In the Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION, PETITIONER

v.

FRANK C. SCHOONEJONGEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DREW S. DAYS, III
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

RICHARD P. BRESS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

ELLEN L. BEARD
Attorney
Department of Labor
Washington, D.C. 20210

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QUESTIONS PRESENTED

Section 402(b)(3) of ERISA, 29 U.S.C. 1102(b)(3), requires every employee benefit plan to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." The questions presented are:

1. Whether Section 402(b)(3) is satisfied by a plan provision stating that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan."

2. Whether, in the absence of a plan-specified amendment procedure, any attempt by the sponsor to amend the plan is ineffective as a matter of law.

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INTEREST OF THE UNITED STATES

This case raises important issues concerning the interpretation and effect of a provision in Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001-1169 (1988 & Supp. V 1993). The Secretary of Labor is responsible for interpreting and enforcing the reporting, disclosure and fiduciary responsibility provisions in Title I of ERISA, including the provision at issue in this case.

STATEMENT

1. Section 402(a)(1) of ERISA provides that every employee benefit plan "shall be established and maintained pursuant to a written instrument" that provides for "one or more named fiduciaries" with "authority to control and manage the operation and administration of the plan." 29 U.S.C. 1102(a)(1). Section 402(b) of the Act requires, among other things, that each plan "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. 1102(b)(3). Section 402 says nothing about the consequences of a plan's failure to contain such provision.

Section 404(a)(1)(D) of ERISA requires plan fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent" with the Act. 29 U.S.C. 1104(a)(1)(D). The Act authorizes a participant or beneficiary to bring a civil action, under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), "to recover benefits due to him under the terms of his plan." Both the duties of plan fiduciaries and the rights of plan participants and beneficiaries are thus measured by the "terms" of the plan. If a plan is amended, of course, its terms change, so determining which amendments are valid is a prerequisite to knowing the terms of the plan.

2. The dispute in this case concerns the validity of a plan amendment adopted by petitioner, the Curtiss-Wright Corporation, which terminated the health benefits of respondents, a class of former employees. Pet. App. 2a. Since 1966, petitioner had provided health benefits to its retirees through a series of insurance carriers. *Id.* at 3a. Petitioner was the plan sponsor[1] and the plan administrator,[2] as well as

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[1] Under Section 3(16)(B) of ERISA, the term "plan sponsor" is defined to mean "(i) the employer in the case of an employee benefit plan established

the plan's sole source of funding. *Ibid.* In ERISA terminology, the plan was a single-employer, employee welfare benefit plan.[3]

In 1976, following the enactment of ERISA, petitioner formalized its health benefits plan by adopting a written Constitution. Pet. App. 4a. In that Constitution, petitioner expressly reserved the right "at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan," and the right "to terminate the Plan established [t]hereby for any reason at any time." *Ibid.* Various documents distributed to plan participants during the 1970s and early 1980s contained similar language. *Id.* at 4a-5a. Beginning in 1979, summary annual reports provided to plan participants stated: "The company expects and intends to

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or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan." 29 U.S.C. 1002(16)(B).

[2] Section 3(16)(A) of ERISA defines the term "administrator," in pertinent part, as "the person specifically so designated by the terms of the instrument under which the plan is operated," or, "if an administrator is not so designated, the plan sponsor." 29 U.S.C. 1002(16)(A)(i) and (ii).

[3] Under the Act, a "multiemployer plan" is a plan "to which more than one employer is required to contribute," and "which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer." 29 U.S.C. 1002(37)(A)(i) and (ii). Any other plan is a "single-employer plan." 29 U.S.C. 1002(41) (Supp. V 1993). The term "employee benefit plan" means an "employee welfare benefit plan," an "employee pension benefit plan," or a plan that is both an employee welfare benefit plan and an employee pension benefit plan. 29 U.S.C. 1002(3). The terms "employee welfare benefit plan" and "employee pension benefit plan" are defined, respectively, in Section 3(1) and (2) of the Act. 29 U.S.C. 1002(1) and (2).

continue this plan indefinitely, but reserves the right to discontinue or amend it." *Id.* at 4a.

In early 1983, petitioner issued a revised summary plan description (SPD) that stated: "Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired." Pet. App. 5a-6a.[4] On November 4, 1983, petitioner notified respondents, who had retired from petitioner's Wood-Ridge, New Jersey, plant, that petitioner would be closing the Wood-Ridge plant at the end of the month, and that respondents' post-retirement health benefits would cease at that time. *Id.* at 6a, 119a. Respondents brought this action in federal district court to challenge the termination of their benefits.

3. After a bench trial, the district court held that petitioner had not effectively amended its plan to permit the termination of respondents' health benefits. Pet. App. 34a-41a. The court found that petitioner had reserved a right to amend the plan, so that respondents were not entitled to vested health benefits for life. *Id.* at 6a, 36a, 40a.[5] In the district

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[4] The parties characterize differently the manner in which this language was incorporated in the plan. According to petitioner, the language was added to the SPD by petitioner's Corporate Director of Benefits and its Labor Counsel, with the approval of its Executive Vice President—the same corporate officials who had established the Plan Constitution in 1976 and were responsible for administering the plan. Pet. 5. Respondents contend that petitioner disavowed having had any intent to amend the plan, and that employees who had no authority to amend the plan amended it inadvertently "through an act of casual redrafting." Br. in Opp. 1-4. The parties also dispute whether the 1983 SPD was distributed to retirees. Pet. App. 5a.

[5] ERISA itself does not require the vesting of welfare benefits, 29 U.S.C. 1051(1), but the parties may agree to vest such benefits as a matter of contract, expressed, for example, through collective bargaining agreements or plan documents. *In re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986). In this case, the question of vested lifetime

court's view, however, petitioner had failed to provide in the plan documents a procedure for amending the plan, in violation of Section 402(b)(3) of ERISA. Pet. App. 37a. Consequently, the district court held, the amendment was void as a matter of law. *Id.* at 40a. Based on those findings, the court entered judgment for respondents in the amount of $2,681,086, *id.* at 105a-106a, the value of the health benefits that respondents would have received had those benefits continued until November 1990, when the benefits were terminated by petitioner through formal action of its board of directors. Br. in Opp. 8.

4. The court of appeals affirmed. Pet. App. 1a-16a. As an initial matter, it agreed with the district court that the amendment provision in petitioner's plan failed to satisfy the requirements of Section 402(b)(3) of ERISA. Pet. App. 7a-9a. In the court's view, "[a] primary purpose of §402(b)(3) is to ensure that all interested parties will know how a plan may be altered and who may make such alterations," and the simple reservation of a right to amend by the plan sponsor does not accomplish those objectives. *Id.* at 8a. The court rejected petitioner's contention that reservation of amendment authority to "the Company" is equivalent for Section 402(b)(3) purposes to a provision authorizing amendment by "the Trustees" of the plan, the designation under a multiemployer pension plan that had passed muster in *Huber* v. *Casablanca Indus., Inc.*, 916 F.2d 85 (3d Cir. 1990), cert. dismissed, 113 S. Ct. 1070 (1993). Pet. App. 8a. The court was of the view that a reference to "the Trustees" clearly identifies the "persons" authorized to amend the plan under Section 402(b)(3), while a reference to "the Company" does not. The Court suggested that *Huber* might provide a better analogy if petitioner's plan

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benefits is not before the Court. The sole question here is whether petitioner terminated respondents' benefits through a valid plan amendment.

had provided for modification by the "Board of Directors," rather than by "the Company." Pet. App. 8a.

The court of appeals also agreed with the district court that, in the absence of a plan-specified amendment procedure, petitioner's 1983 amendment was invalid as a matter of law. Pet. App. 9a-11a. In the court's view, that result is necessary to accomplish "fundamental" purposes of ERISA:

> The basic premise of ERISA is that a plan sponsor will be free to determine what benefits the plan will provide, but that once such a determination has been made, the benefits must be described in a written plan that is available to participants at any time upon request. Thereafter the participants are entitled to rely upon the plan document as defining the benefits currently being provided. Unless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan. It is in this way that ERISA provides certainty and protects participants against frustration of their legitimate expectations.

Id. at 10a.

The court of appeals relied, in addition, on case law holding that "amendments which are not adopted substantially in accordance with a plan's amendment procedures are ineffective to alter the terms of a plan." Pet. App. 10a, citing *Albedyll* v. *Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 255 (7th Cir. 1991), and *Frank* v. *Colt Indus., Inc.*, 910 F.2d 90, 98 (3d Cir. 1990). The court believed that the same result should obtain when the plan provides no amendment procedures at all, because, otherwise, those who

violate Section 402(b)(3) would be in a better position than those who comply with it. Pet. App. 11a.[6]

Judge Roth concurred in the judgment. Pet. App. 8a n.3. In her view, action by "the Company" means action by its board of directors or by whatever other person or entity within the corporation has authority to take such action as a matter of state corporation law. Judge Roth concluded that the amendment at issue in this case was not effective, however, because, she believed, neither petitioner's board nor any other person or entity with power to act on petitioner's behalf had issued or ratified it. *Ibid.*

SUMMARY OF ARGUMENT

I. Petitioner's plan meets the baseline requirements of Section 402(b)(3). By specifying that petitioner reserves the right to amend, the language at issue clearly identifies petitioner as the "person[] who ha[s] authority to amend the plan." The court of appeals' view that the Act requires an identification of the particular individuals within the corporation with authority to act is inconsistent with the definition of "person" in Section 3(9) of the Act, which expressly encompasses corporations. If Congress had intended to require plans to specify the individuals with authority to modify the plan, it would have said so.

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[6] The court limited the scope of its holding in two respects. First, it held that sponsors that have reserved a right to amend in language that does not comply with Section 402(b)(3) are not "forever foreclosed" from amending their plans. Pet App. 11a. Rather, "an amendment designed solely to bring a plan into compliance with [Section 402(b)(3)] can be effectively adopted by formal action of those who possess the sponsor's final management authority"—in this case, formal action by petitioner's board of directors. *Ibid.* Second, the court noted that its holding "should not be construed to extend beyond a situation in which a plan sponsor amends the plan in a fashion which is advantageous to the sponsor's interest and in which the beneficiaries of the plan later challenge that amendment." *Id.* at 11a n.5.

The court of appeals' holding that the plan amendment procedure must be spelled out in detail is based on that court's view that a primary purpose of Section 402(b)(3) is to provide disclosure to plan participants of the means by which the plan may be amended. Although we agree that Section 402(b)(3) serves an important, indirect disclosure function, it is clear from the language of Section 402(b)(3) and the structure of the Act that the Section's predominant purpose is to ensure that employee benefit plans all have some mechanism for amendment. The issue is not, therefore, whether petitioner's plan describes its amendment procedure in detail, but rather whether it provides enough information to permit interested parties to determine when and whether an amendment has been promulgated.

This case presents a close question, but we ultimately agree with Judge Roth that petitioner's reservation of the right to amend should be read against the background of corporation law to mean amendment by petitioner's board of directors or by any individual or committee to whom the board has delegated that authority. Understood in that fashion, the provision provides sufficient guidance to evaluate the bona fides of any given amendment. Although a more closely drawn and defined procedure would facilitate that evaluation, the Act does not define or restrict the particular amendment procedures that may be used.

II. The Third Circuit erred in holding that an amendment promulgated in the absence of a plan-specified amendment procedure is void as a matter of law. In light of Congress's intent through Section 402(b)(3) to ensure that each employee benefit plan would include some mechanism for amendment, it is perverse to suggest that the failure of a plan document to specify a procedure for amendment means that the plan cannot be amended. When Congress intended, under the Act, to restrict or condition a sponsor's ability to amend, it did so in no uncertain terms. Moreover, as Congress provided

participants, beneficiaries, and fiduciaries with the ability, through Section 502(a)(3) of the Act, to compel plan sponsors to provide plan amendment procedures, there is no need to fashion a judicial remedy to enforce compliance.

Established principles of trust law provide a sound basis for determining the validity of an amendment promulgated in the absence of a plan-specified procedure. Under trust law, when a settlor makes clear his reservation of authority to amend the trust but fails to set out a procedure for doing so, he may exercise that authority in any manner that sufficiently manifests his intention to modify the trust. By analogy, a plan sponsor should be required to establish that an amendment has been promulgated with due authority, in a formal writing, and delivered to the plan's fiduciaries.

Contrary to the view of the court of appeals, as a general matter, when plan documents make clear that the plan may be amended, giving effect to written plan amendments is wholly consistent with employees' reliance interests. By refusing to give effect to amendments otherwise authorized by a plan on the basis of the plan's violation of Section 402(b)(3), the court's automatic invalidation rule deprives employees of their ability to rely on the terms of the written plan, and thereby undermines one of the fundamental goals of the Act.

Finally, although we agree that an amendment passed in violation of plan-specified procedures is invalid, we do not believe that conclusion compels the invalidation of amendments passed in the absence of an amendment procedure conforming to the requirements of Section 402(b)(3). The two circumstances raise wholly different concerns under the statute, lead to differing results under the common law of trusts, and have disparate effects on employees' reliance interests. Moreover, we see no "perverse incentives" problem in treating the circumstances differently, because employees have the power, under Section 502(a)(3) of the Act, to force an

otherwise recalcitrant employer to set out in the plan procedures for amendment of the plan.

ARGUMENT

I. THE AMENDMENT PROVISION IN PETITIONER'S PLAN SATISFIES THE REQUIREMENTS OF SECTION 402(b)(3) OF ERISA

Section 402(b)(3) of ERISA requires every employee benefit plan to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. 1102(b)(3). Although in our view whether petitioner's plan complies with Section 402(b)(3) presents a close question, on balance we agree with Judge Roth that the plan's reservation to petitioner of the power to amend satisfies the requirements of the Act, standing alone. The Secretary of Labor would, however, have authority under Section 505 of the Act, 29 U.S.C. 1135, to issue regulations requiring more detailed plan provisions to ensure the availability to participants, beneficiaries, and fiduciaries of sufficient information to determine more precisely how an amendment may be adopted and whether a particular amendment has become effective.

1. Petitioner's plan states: "[T]he Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." Pet. App. 4a. That language identifies the "Company" as "the person[] who ha[s] authority to amend the plan." The court of appeals believed that language insufficient, however, on the ground that naming "the Company" does not disclose "what individuals or bodies within the Company"—such as the board of directors—can promulgate an effective amendment. *Id.* at 8a.

The court's conclusion is at odds with the text of the Act. Section 3(9) of ERISA defines "person" to mean "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." 29 U.S.C. 1002(9). Although "individual" is included within this definition of "person," so too is "corporation." Nothing in Section 402(b)(3) suggests that a plan complies with Section 402(b)(3) only if it designates particular types of "person[s]," such as specific individuals within a corporation. Indeed, the Secretary of Labor has relied on the definition in Section 3(9) in an analogous context to permit a plan sponsored by a corporation to designate the corporation itself as the "named fiduciary" under Section 402(a)(1) of ERISA, 29 U.S.C. 1102(a)(1). 29 C.F.R. 2509.75-5 (FR-3) (ERISA Interpretive Bulletin 75-5). If designating the corporation itself "satisfies the requirement of enabling employees and other interested persons to ascertain the person or persons responsible for operating the plan" under Section 402(a)(1), as the Secretary stated in Interpretive Bulletin 75-5, *supra*, it should serve equally well to identify the person or persons authorized to amend the plan under Section 402(b)(3).[7]

2. That does not end the matter, however, because Section 402(b)(3) also requires that a plan "provide a procedure for amending such plan." In that respect, the sufficiency of the language in petitioner's plan presents a closer question.

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[7] The Act does not, in terms, require "identification of the persons with authority to amend the plan," but rather "provi[sion] [of] a procedure * * * for identifying the persons who have authority to amend the plan." 29 U.S.C. 1102(b)(3). Although we acknowledge that the language used is curious, it is doubtful that Congress intended by it to require a process for identifying the *individuals* with authority to amend the plan; given Section 3(9)'s expansive definition of the term "person," if Congress had intended in Section 402(b)(3) to refer to "individuals," it presumably would have used that word instead.

Although the plan plainly identifies petitioner as the party authorized to amend the plan, and makes clear that petitioner's power to amend the plan is unrestricted in both timing and scope, it says nothing on its face about *how* petitioner must act to effect an amendment.

In common usage, the term "procedure" means "a particular way of doing or of going about the accomplishment of something." *Webster's Third New International Dictionary* 1807 (1986); see also *The Random House Dictionary of the English Language* 1542 (2d ed. 1987) (defining "procedure" to mean "a manner of proceeding in any action or process" or "a particular course or mode of action"). In a somewhat narrower connotation, the term is understood to mean "any given mode of conducting legal, parliamentary, or other business." *Ibid.*

As the court of appeals noted, petitioner's plan did not, in terms, specify "a particular way" petitioner would "go[] about" promulgating amendments to the plan. Nor did the plan identify the body or officers within petitioner with authority to change the plan. On the other hand, as Judge Roth noted, action by a corporation is generally understood to mean "action taken by the board of directors or whomever of the company has the authority to take such action under the law of the state of incorporation of the company in question." Pet. App. 8a n.3; see generally 2 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 495 *et seq.* (1990). In that respect, provision for action by petitioner, a corporation, may be understood to mean action according to the corporate "mode."

The dispute between the majority and concurring opinions in this case comes down to a disagreement over the extent to which Section 402(b)(3) requires the plan to set out expressly the facets of the amendment procedure that may otherwise be understood to be incorporated into the plan as a matter of law. The language of Section 402(b)(3), read in isolation, does not

resolve that question. We believe that the answer hinges on the purpose of the Section 402(b)(3) requirement, and that such purpose is best discerned through analysis of that Section's role within the overall structure of the Act.

a. Section 402 of the Act lists certain basic provisions that "shall" be included in every employee benefit plan. 29 U.S.C. 1102. Section 402(a)(1) requires that all plans be "established and maintained pursuant to a written instrument." 29 U.S.C. 1102(a)(1). In addition to requiring that plans provide a procedure for their amendment, Section 402(b) requires that all plans provide for one or more "named fiduciaries," provide "a procedure for establishing and carrying out a funding policy and method," "describe any procedures under the plan for the allocation of responsibilities for the operation and administration of the plan," and "specify the basis on which payments are made to and from the plan." 29 U.S.C. 1102(b).

The requirements of Section 402(b) serve an important, albeit indirect, informational function. Under Sections 104(b)(2) and (4) of the Act, plan administrators must make available to participants, upon written request, copies of plan documents, including the latest summary plan description and annual report, the trust agreement, and "other instruments under which the plan is established or operated." 29 U.S.C. 1024(b)(2) and (4). Because a plan document setting forth the information required under Section 402(b) is an "instrument[] under which the plan is established or operated," plan participants may obtain and review such a document upon request. The written instrument requirement of Section 402(a)(1) thus works in tandem with the disclosure requirements of Section 104(b) to ensure that all affected parties have access to the documents that provide the structure of ERISA plans.[8]

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[8] The ERISA conference report confirms that one important purpose of Section 402(a)(1)'s requirement of a written plan is to provide information to

Although Congress thus intended to afford participants and beneficiaries access to the documents comprising ERISA plans, we believe the court of appeals erred in giving dispositive effect to what it perceived to be "[a] primary purpose of §402(b)(3)[,] * * * to ensure that all interested parties will know how a plan may be altered and who may make such alterations." Pet. App. 8a. Congress unquestionably intended, through Section 402(a)(1)'s written instrument requirement, to provide affected parties with access to the document containing the plan's amendment procedure—the same access such parties have to all plan documents—but there is no indication in the text or relevant legislative history that Section 402(b)(3) was itself enacted for the purpose of providing that disclosure. To the contrary, the language of Section 402(b)(3), that Section's place within the structure of the Act as a whole, and the (admittedly sparse) legislative history all indicate that the Section's predominant purpose is simply to ensure, for functional reasons, that all plans have some definitive means for their amendment.

To begin with, Section 402(b)(3) is not located in the "Reporting and Disclosure" part of the Act, 29 U.S.C. 1021-1031. It is, instead, codified in the "Fiduciary Responsibilities" part of the Act, 29 U.S.C. 1101-1114, within a section entitled "Establishment of plan." 29 U.S.C. 1102. More precisely, it is located within a subsection entitled

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plan participants about its basic structure. In discussing Section 402(a), the report explains:

> [E]very covered employee benefit plan (both retirement and welfare plan) is to be established and maintained in writing. A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan. Also, a written plan is required so the employees may know who is responsible for operating the plan.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 297 (1974).

"Requisite features of plan." 29 U.S.C. 1102(b). Section 402(b) is, as its title suggests, written in imperative language, providing that "[e]very employee benefit plan *shall*" include certain operational provisions, including a procedure for amending the plan. 29 U.S.C. 1102(b) (emphasis added). The language used suggests that Congress believed it critical that all plans have, as a basic term, some provision for their amendment,[9] just as all plans must (in addition to being in written form) have, as basic terms, some provision for "named fiduciaries," a "funding policy and method," "allocation of responsibilities for the operation and administration of the plan," and "the basis on which payments are made to and from the plan." Section 402 thus prescribes the framework for what are, in effect, the constitutional elements of the plan—those that allocate the powers to take actions affecting the plan, provide for its financial support, and set out the bases for its benefits payments. Understood in this light, Section 402, including its subsection (b)(3), need not be read (in the absence of implementing regulations) to require any particular level of detail. It is sufficient if the essential elements are present to enable the plan to function. Cf. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 407 (1819) ("[I]t is a constitution we are expounding.") (emphasis omitted).

It might be argued that if Congress had intended to ensure nothing more than that all plans would be subject to amendment, it could have accomplished that result directly,

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[9] Notwithstanding Congress's desire that plans be amendable generally, employers sometimes do (and under the Act may), by using sufficiently clear language in a plan document, choose to bind themselves to provide a specified level of benefits to certain participants (generally retirees) for life. See *United Steelworkers* v. *Connors Steel Co.*, 855 F.2d 1499, 1504-1505 (11th Cir. 1988), cert. denied, 489 U.S. 1096 (1989); *Local Union No. 150-A, UFCW* v. *Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985); *Policy* v. *Powell Pressed Steel Co.*, 770 F.2d 609, 614-615 (6th Cir. 1985), cert. denied, 475 U.S. 1017 (1986).

simply by stating that all plans are amendable as a matter of law.[10] Such a directive would not have been sufficient, however, because, at least with respect to some plans, it would not have identified *who* could effect an amendment and accordingly would not have accomplished an allocation of that fundamental power. Moreover, while the legislative history is sparse in many respects, it reveals that Congress considered and rejected language that would have prescribed, with respect to specified types of amendment, a particular manner of amendment (by the plan administrator) in favor of permitting each plan to identify on its own the party having

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[10] The language Congress actually used has been read by some courts to accomplish precisely that result. For instance, in *Biggers* v. *Wittek Indus., Inc.*, 4 F.3d 291, 295 (4th Cir. 1993), the court believed that "the power to * * * amend an employee welfare benefit plan is inherently reserved to the employer under ERISA," and it held, accordingly, that "an employer who fails to include procedures in its plan for amendment is in the same position as the settlor who has reserved the power to amend but not provided a method for exercising it." Accord *Murphy* v. *Keystone Steel & Wire Co.*, 850 F. Supp. 1367, 1382 (C.D. Ill. 1994). We do not contend here that ERISA plans are, by virtue of ERISA itself, amendable in the absence of any express reservation of amendment authority. We believe that such an absolute rule would present difficulties, in light of the very real possibility that employees might in some circumstances justifiably assume from the absence of any express notice of amendment authority that their benefits will not be terminated or modified to their detriment. By analogy, under the common law of trusts, a settlor is permitted generally to modify the trust only if he has reserved the power to do so by the terms of the trust. *Restatement (Second) of Trusts* §§ 330, 331 (1959); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* §§ 992, 998 (rev. 2d ed. 1983). The equities may not, on the other hand, always run in favor of holding an amendment invalid solely on the ground that the underlying plan fails to contain an express reservation of the power to amend. For instance, participants might justifiably rely on benefit-enhancing amendments to a plan even in the absence of a plan provision expressly reserving the right to amend. In any event, those issues are not presented by this case.

authority to amend and the procedure to be used.[11] To the extent that the drafting history provides any insight into Congress's intent, it reinforces the textual implication that Congress was focussing primarily on ensuring the existence of a mechanism for amendment of ERISA plans.

The functional orientation of Section 402(b)(3) is demonstrated, in addition, by contrast to the provisions of ERISA that are in terms disclosure-oriented. In particular, Section 104(b)(1) requires the plan administrator to furnish periodically to each participant and beneficiary "a copy of [the] summary plan description, and all modifications and changes referred to in section [102(a)(1)]." 29 U.S.C. 1024(b)(1) (Supp. V 1993). Whereas Section 402(b)(3) states, without elaboration, that the plan "shall provide a procedure

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[11] The concept of plan amendment appeared for the first time when the primary House bill, H.R. 2, was reported out of committee. In that draft, the bill required that the plan "identify and appoint an administrator * * * who shall * * * have full authority for the operation of such employee benefit plan including the authority to * * * amend such plan where such an amendment is necessary to meet the requirements of this Act or where such an amendment is necessary to protect the interests of the participants." H.R. 2, 93d Cong., 1st Sess. § 111(a)(1) (1973). The corresponding section of the Senate bill, S. 4 (later designated H.R. 2), included no language whatever respecting amendment. See S. 4, 93d Cong., 1st Sess. § 510 (1973). In a document listing the differences between the House and Senate bills, the staff of the Conference Committee suggested that "[t]he conferees may wish to provide that each pension plan is to provide a procedure for specifying a funding policy and the allocation of responsibilities with respect thereto. In addition, each plan is to specify the procedure for amending the plan." *Summary of Differences Between the Senate Version and the House Version of H.R. 2 To Provide for Pension Reform*, 93d Cong., 2d Sess. Pt. 3, at 12 (Comm. Print June 12, 1974). That suggestion was evidently adopted and incorporated into the language passed by both Houses without comment. The conference reports note only that "[e]ach plan * * * is to provide a procedure for amendments and for identifying who can amend the plan." H.R. Conf. Rep. No. 1280, *supra*, at 298; S. Conf. Rep. No. 1090, 93d Cong., 2d Sess. 298 (1974).

for amending [the] plan," 29 U.S.C. 1102(b)(3), Section 102(a)(1) requires that summary plan descriptions and summaries of modifications be "written in a manner calculated to be understood by the average plan participant" and, further, that plan descriptions "be sufficiently accurate and comprehensive to reasonably apprise * * * participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. 1022(a)(1). It is noteworthy that Congress did not include the procedure for amendment of the plan among the information required to be disclosed in summary plan descriptions.[12]

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[12] Section 102(b) requires that plan descriptions and summary plan descriptions include the following information:

> The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under [Section 503, 29 U.S.C. 1133]).

29 U.S.C. 1022(b). The Report of the Senate Committee on Labor and Public Welfare confirms that Congress intended through this list to ensure that summary plan descriptions would contain "a summary of the plan's important provisions." S. Rep. No. 127, 93d Cong., 1st Sess. 28 (1973); see also H.R. Conf. Rep. No. 1280, *supra*, at 258 ("summary is to include important plan provisions").

b. Section 402(b)(3)'s functional orientation should guide this Court's determination of the detail and manner in which a plan's amendment procedure must be drafted. If, as the court of appeals believed, the primary purpose of Section 402(b)(3) were disclosure, an amendment procedure might well have to be drafted in a manner that is both comprehensible to the average plan participant and comprehensive (*i.e.*, able to be understood without reference to the underlying requirements of ERISA or background principles of corporate law). But because the primary purpose of Section 402(b)(3) is to ensure that each plan contain some mechanism for amendment, the sufficiency of a plan-specified procedure should turn, instead, on whether the information set forth—here, amendment by petitioner—provides plan fiduciaries (and others) with a basis for determining when and whether the plan has been amended.[13]

Although the question is not free from doubt, we believe the information provided by petitioner's plan meets the baseline requirements of the Act. The plan's provision that

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[13] Most multiemployer plans should pass muster under that standard. In circumstances involving multiemployer pension plans, the entity with the power to amend the plan will generally be a committee, joint board of trustees, or other similar group comprised of representatives of the parties who established or maintain the plan. 29 U.S.C. 1002(16)(B). The decision-making processes of such boards or committees will ordinarily be set forth in detail in their operative documents. See, *e.g.*, 29 U.S.C. 186(c)(5); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 328-332, 336-337 (1981) (discussing the decision-making requirements of 29 U.S.C. 186(c)(5)). If, as we believe, an amendment provision may incorporate or be understood against background legal principles, then procedures set forth elsewhere in applicable plan documents should also suffice. Although the Third Circuit's decision in *Huber* v. *Casablanca Indus., Inc.*, 916 F.2d 85 (1990), cert. dismissed, 113 S. Ct. 1070 (1993), does not identify the source of the particular procedure followed by the trustees in that case, we think it likely that the procedure was described in underlying trust documents and that the case was, therefore, correctly decided.

amendments are to be effected by petitioner means, at least, that an amendment will be validly promulgated only if adopted by action of petitioner's board of directors, or through action by a committee or individual to whom the board has delegated such authority. Del. Code Ann. tit. 8, § 141(a)(1991).

We acknowledge some discomfort in suggesting that the plan's language, which amounts to little more than a bare reservation of the right to amend, provides a "procedure" for amendment. The Act itself, however, provides no guidance as to what further information may be required. For instance, the court of appeals suggested that provision for amendment through action "by the board of directors" might suffice. We agree that the determination whether an amendment has been duly authorized would be facilitated if all corporate sponsors were required to restrict amendment authority to their boards of directors or to particular, identified corporate officers. Proof problems might also be averted if all amendments were required to be effected through a distinct written document, as opposed to the situation in this case, in which the only writing that manifested the amendment was a revised and restated summary plan description. The Act on its face does not, however, forbid a corporation from reserving its right to act in any authorized manner or dictate a particular amendment format.[14]

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[14] Although the Secretary of Labor has broad rulemaking authority under Section 505 of ERISA, 29 U.S.C. 1135, the Secretary has not, to this point, provided interpretive guidance respecting Section 402(b)(3) nor exercised that rulemaking authority to require plan amendment procedures more detailed than those required by the terms of the Act. As petitioner notes (Pet. 8), the Internal Revenue Service promulgated a prototype plan with language similar to that at issue here, see 7 *Pension and Profit Sharing 2d* 140,569 (R.I.A. 1992), which presumably reflects the Service's understanding regarding the requirements of Section 402(b)(3), and which may have led plan sponsors to assume that such language suffices to meet the requirements of the Act. Although the dissemination of that prototype

II. A FAILURE TO COMPLY WITH SECTION 402(b)(3) OF ERISA DOES NOT AUTOMATICALLY RENDER VOID AN AMENDMENT THAT IS OTHERWISE AUTHORIZED BY THE PLAN

The court of appeals held that when an employee benefit plan reserves the right of the sponsor to amend, but fails to provide a procedure for amendment in conformity with the requirements of Section 402(b)(3), the plan may not be amended. Pet. App. 11a. In the court's view, an amendment adopted in the absence of a plan-specified amendment procedure is a nullity, ineffective as a matter of law to change the prior terms of the plan.[15] The court's rule has no basis in

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provision, and the use of similar language in other standard forms (see Pet. 8), may, as a practical matter, weigh against recognition by the Court of a more demanding construction of Section 402(b)(3), the prototype language is itself owed no heightened deference as a legal matter, because the Service has no interpretive or enforcement authority with respect to matters arising under Section 402 of the Act.

[15] As described at note 6, *supra*, the court of appeals qualified its holding in two material respects. First, the court made clear that it would permit a sponsor of a plan lacking an amendment procedure to amend its plan to provide such a procedure. Pet. App. 11a. Second, it restricted the scope of its holding to circumstances in which the sponsor has acted to amend the plan "in a fashion which is advantageous to the sponsor's interest." *Id.* at 11a n.5. Neither qualification is entirely faithful to the court's broad holding that "[u]nless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan." *Id.* at 10a. In any event, this case does not present the issue of whether, or under what circumstances, promulgation of a plan amendment that favors participants, in whole or in part, should be given effect absent a plan procedure that complies with Section 402(b)(3), or even absent compliance with a plan-specified procedure. Statements by a plan sponsor to participants regarding the plan may, in some circumstances, create

the text or structure of the Act. Although the court was properly attentive to the rights of plan participants, it misapprehended the nature of the reliance interests at stake and failed to strike a fair balance, under the circumstances, between the competing interests of plan participants and plan sponsors. Thus, even if this Court agrees with the court of appeals that petitioner's plan violates Section 402(b)(3), this Court should not follow the court of appeals' approach regarding the consequences of the statutory violation. We urge the Court, instead, to adopt an approach, consistent with the language and structure of the Act, that is guided by traditional principles of trust law. We believe that approach will protect the legitimate interests of plan participants and beneficiaries without needlessly disrupting the operations of plans and plan sponsors.

1. Nothing in Section 402 of ERISA or in any other provision of the Act suggests that a plan amendment that complies with ERISA and with the terms of the underlying plan has no legal effect simply because the plan itself fails expressly to include an amendment procedure, in violation of Section 402(b)(3). To the contrary, the Act's directive that all plans be subject to amendment argues strongly against a rule of automatic invalidation. By way of analogy, it is well established that a formal, written plan in compliance with Section 402(a)(1) is not a prerequisite for ERISA coverage; rather, a plan exists if "from the surrounding circumstances a reasonable person c[an] ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." *E.g.*, *Donovan* v. *Dillingham*, 688 F.2d 1367, 1372, 1373 (11th Cir. 1982) (en banc); *Gordon* v. *Barnes Pumps, Inc.*, 999 F.2d 133, 136 (6th Cir. 1993); *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503-1504 (9th Cir. 1985). By the same

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reliance interests that warrant enforcement irrespective of the formal effect of such statements on the plan.

token, the absence of a "named fiduciary," as required by Section 402(a)(1), does not mean that no one has fiduciary duties to the plan; it merely requires a court to consult the functional definitions of "administrator" and "fiduciary" in Sections 3(16) and (21), 29 U.S.C. 1002(16) and (21), to determine who does. And the absence of a stated "procedure for establishing and carrying out a funding policy and method," as required by Section 402(b)(1), does not excuse a plan sponsor from its duty to fund the plan or to pay promised benefits thereunder. By the same reasoning, the absence of an amendment procedure conforming to Section 402(b)(3) should not, alone, render a plan unamendable; it would be perverse to construe Section 402(b)(3) as a bar, when that Section's very purpose is to ensure that plans be susceptible to amendment. Cf. *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 507 (1993) ("It would make little sense to interpret directives designed to ensure the expeditious collection of revenues in a way that renders the Government unable, in certain circumstances, to obtain its revenues at all.").

When Congress intended to establish conditions precedent to plan amendment, it did so unequivocally. Thus, under Section 204(h), a defined benefit plan or an individual account plan subject to the funding standards of Section 302, 29 U.S.C. 1082, "may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to [affected participants, beneficiaries, and unions]." 29 U.S.C. 1054(h). Congress's demonstrated ability to articulate in the Act express conditions for the effectiveness of plan amendments weighs against the imposition of further conditions through judge-made rules. See *United States* v. *Shabani*, No. 93-981 (Nov. 1,

1994), slip. op. 5; *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 583 (1982).

Significantly, under Section 502(a)(3) of ERISA, a participant, beneficiary, or fiduciary may bring a civil action "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. 1132(a)(3). Because the Act thereby provides participants, beneficiaries, and fiduciaries with the ability to compel an otherwise recalcitrant employer to provide a definitive amendment procedure, there is no need to fashion a post hoc remedy of amendment invalidation to enforce compliance.[16]

2. Although the language and structure of the Act thus militate against the court of appeals' rule of per se invalidity, the Act itself provides no guidance for determining, in the absence of a plan-specified procedure, the circumstances under which a plan amendment should be given effect. Where the text of the Act provides no clear answer, this Court has turned for interpretive aid to established principles of trust law, in recognition of "ERISA's roots in the common law of trusts." *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063, 2068 (1993); see *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989); *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 156-157 (1985) (Brennan, J., concurring in the judgment).

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[16] Indeed, because plan fiduciaries are required to discharge their duties "in accordance with the documents and instruments governing the plan," 29 U.S.C. 1104(a)(1)(D), and are subject to suit under Section 502(a) for failure to do so, fiduciaries have a particular interest in being able to determine clearly the validity of plan amendments, and therefore have a strong incentive to compel employers to provide defined processes for amendment.

As several courts have recognized, the common law has developed principles for determining the effectiveness of a trust amendment when the settlor has reserved the power to amend but not specified in the trust instrument the method of modification.[17] Under those principles, the settlor may, in the absence of a specified procedure, exercise the power to amend in any manner that "sufficiently manifests his intention to modify the trust." *Restatement (Second) of Trusts* § 331 cmt. c (1959); compare G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 993, at 239 (rev. 2d ed. 1983) (power to amend may be exercised "in any reasonable manner"). To meet that test, the settlor must, by his action, indicate that he has reached a "definitive decision" to modify the trust, and that he is not merely contemplating taking some action in the future. *Restatement*, *supra*, § 330 cmt. i. Bogert suggests that "[n]otice of amendment to the trustee should be a requirement, since the modification will surely affect his duties." Bogert, *supra*, § 993, at 239-240 (footnote omitted); accord *Restatement*, *supra*, § 330 cmt. i.

We believe that standard should control: In the absence of a plan-specified amendment procedure, the law should give effect to an authorized act by a plan sponsor that clearly manifests the sponsor's intention to amend the plan. If challenged, the sponsor should, at a minimum, be required to demonstrate that it acted in a definitive manner, as prescribed by otherwise applicable law, such as state corporate law (as suggested by Judge Roth), the corporation's own by-laws, the requirements of the Labor Management Relations Act for multiemployer plans, and/or any applicable plan documents. In accordance with established law (and consistent with the need for a clear manifestation of intent), the amendment should be set forth in a formal writing and be provided to plan

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[17] See, *e.g.*, *Biggers* v. *Wittek Indus., Inc.*, 4 F.3d at 295; *Murphy* v. *Keystone Steel & Wire Co.*, 850 F. Supp. at 1382.

fiduciaries.[18] We believe that these principles provide a reasonable, tested standard that is consistent with the purposes of the Act and attentive to the legitimate interests and expectations of the affected parties.

3. The Third Circuit's rule of per se invalidity is both at odds with the goals of ERISA and out of step with the reasonable expectations and interests of the parties. The court of appeals justified the rule as necessary to "provide[] certainty and protect[] participants against frustration of their legitimate expectations." Pet. App. 10a. Although the court was rightly solicitous of the interests of the plan participants, it seems to have given no thought to their ability under Section 502(a)(3) to compel compliance with the Act. Moreover, its cure was worse than the disease. By creating the potential in all cases for retroactive invalidation, the court's rule deprives participants of their ability "to rely upon the plan document as defining the benefits currently being provided." Pet. App. 10a. It thereby eliminates the certainty Congress sought to achieve through Section 402(a)(1)'s written instrument requirement and frustrates the very interests the Third Circuit sought here to vindicate.

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[18] In general, an oral or informal written communication is ineffective to amend the terms of a written plan. See *Coleman* v. *Nationwide Life Ins. Co.*, 969 F.2d 54, 58-59 (4th Cir. 1992), cert. denied, 113 S. Ct. 1051 (1993); *Cefalu* v. *B.F. Goodrich Co.*, 871 F.2d 1290, 1295-1297 (5th Cir. 1989); *Moore* v. *Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Straub* v. *Western Union Telegraph Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988); *Nachwalter* v. *Christie*, 805 F.2d 956, 960 (11th Cir. 1986). Some courts have, however, applied principles of estoppel to enforce informal attempts to amend when the failure to do so would upset employees' reasonable expectations. See, *e.g.*, *Black* v. *TIC Inv. Corp.*, 900 F.2d 112, 114-115 (7th Cir. 1990) (collecting cases); but see, *e.g.*, *Miller* v. *Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992) (refusing to apply estoppel, on the ground that Section 402(a)(1)'s written instrument requirement precludes reasonable reliance on any oral communication that conflicts with the terms of the written plan), cert. denied, 113 S. Ct. 1586 (1993).

The systemic uncertainty engendered by the Third Circuit's rule is not justified by any substantial threat to the interests of plan participants and beneficiaries. In circumstances when, as here, a plan expressly mentions the possibility of amendment and gives the right to amend to an identified person, the rule of automatic invalidation bears no relationship to any harm actually or even potentially caused by the violation of Section 402(b)(3). In this case, for example, the harm to respondents—loss of retiree health benefits—was caused entirely by the substance of the plan amendment, not by the manner in which it was adopted. The plan itself put participants on notice that petitioner could amend it, in whole or in part, at any time. No participant who actually read that amendment language could have had any legitimate expectation that the plan could never be amended. Nor does there appear to be any record evidence that petitioner would have made a different decision about terminating respondents' benefits if the plan documents had contained a more detailed procedure. It is difficult to justify the invalidation of a clearly announced modification that the plan sponsor had every right to make in the absence of a statutory or plan prohibition against the manner of amendment or of any articulable harm,[19] particularly in light of the "tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs," *Mertens* v. *Hewitt Associates*, 113 S. Ct. at 2072.

The court of appeals justified its decision, in addition, on the ground that it would be somehow unfair to treat this case differently from cases in which the sponsor has set forth a procedure and not followed it. Since amendments adopted in a manner contrary to a plan's own amendment procedure are

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[19] Cf. *Carey* v. *Piphus*, 435 U.S. 247 (1978) (refusing to grant substantive relief for a violation of procedural due process that caused no actual harm).

generally held to be ineffective to alter the terms of the plan,[20] the court reasoned that the same result should obtain where the plan has no amendment procedure at all; otherwise, those who violate Section 402(b)(3) would be in a better position than those who comply with it. Pet. App. 10a-11a. The two circumstances, however, raise distinct concerns under the Act, are treated differently under the law of trusts, and involve disparate reliance issues.

In the absence of a plan-specified procedure for amendment, the manner in which an amendment is promulgated cannot be said to violate the terms of the plan. The same cannot be said, however, for an amendment promulgated in a manner contrary to that set out in a plan-specified procedure. In the latter circumstance, the plan itself creates a condition precedent—promulgation through the stated procedure—to effectiveness of a plan amendment. An amendment promulgated without satisfying that condition precedent is ineffective under the express terms of the plan, and administration of a plan in accordance with an ineffective amendment is prohibited by Section 404(a)(1)(D), which requires that a plan be administered "in accordance with the documents and instruments governing the plan." 29 U.S.C. 1104(a)(1)(D).

Treating the two circumstances differently is consistent, as well, with their treatment under the common law. Under established trust principles, a settlor who reserves the power to revoke or modify a trust only in a particular manner or under particular circumstances may revoke or modify the trust only in that manner or under those circumstances. See

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[20] See, *e.g.*, *Elmore* v. *Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994) (en banc); *Miller* v. *Coastal Corp.*, 978 F.2d at 624; *Albedyll* v. *Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 254-255 (7th Cir. 1991); *Grun* v. *Pneumo Abex Corp.*, 808 F. Supp. 632 (N.D. Ill. 1992); *Siskind v. Sperry Retirement Program*, 795 F. Supp. 614, 617-618 (S.D.N.Y. 1992).

Restatement, supra, § 330 cmt. j; *id.* § 331 cmt. d.[21] Under ERISA, as under the law of trusts, determining the validity of an amendment with reference to the procedural limitations set forth in the plan documents gives effect to the manifested intent of the sponsor and fulfills the reasonable expectations of the parties.[22]

Finally, the court of appeals' perverse incentives argument lacks force under its own terms. Assuming that an employer might prefer to forgo providing any procedure for amendment (to avoid the risk that a procedural gaffe might invalidate a desired plan amendment), the employer can be enjoined by any interested fiduciary, participant, or beneficiary to comply with Section 402(b)(3), irrespective of that preference. 29 U.S.C. 1132(a)(3).

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[21] Some courts have, in practice, exercised discretion to give effect to trust amendments despite slight procedural irregularities. *E.g., In re Florance*, 343 N.W.2d 297, 301 (Minn. Ct. App. 1984), aff'd in part, rev'd in part on other grounds, 360 N.W.2d 626 (Minn. 1985); *Woodward* v. *Ameritrust Co.*, 751 F.2d 157, 160-161 (6th Cir. 1984). We would be similarly inclined, under those circumstances, to honor substantial compliance with plan procedures. Cf. *Aronson* v. *Servus Rubber, Division of Chromalloy*, 730 F.2d 12, 14-16 (1st Cir.) (giving effect to substantial compliance with specified plan termination procedures), cert. denied, 469 U.S. 1017 (1984).

[22] If the Court determines that petitioner's plan provides a procedure for amendment conforming to the requirements of Section 402(b)(3), the issue will shift on remand to whether petitioner followed that procedure (including conformity with background requirements of state corporation law for petitioner to take effective action) when it promulgated the subject amendment.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

EDWIN S. KNEEDLER
Deputy Solicitor General

ALLEN H. FELDMAN
Associate Solicitor

RICHARD P. BRESS
Assistant to the Solicitor General

ELLEN L. BEARD
Attorney
Department of Labor
Washington, D.C. 20210

Department of Justice
Washington, D.C. 20530
(202) 514-2217

NOVEMBER 1994